United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7439

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL STARCH & CHEMICAL CORPORATION,
Plaintiff-Appellee,

against

SS HERMIONE, her engines, boilers. etc.,
APOLLO SHIPPING CO.,
Defendants,

and

AMBER MARITIME CORP.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLEE'S BRIEF

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TABLE OF CONTENTS

Cases: Page

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----------X

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----------X

BRIEF FOR THE PLAINTIFF-APPELLEE

ISSUES PRESENTED FOR REVIEW

This is an appeal from a decision of the United States District Court for the Southern District of New York holding that Amber Maritime Corporation, Defendant-Appellant, (hereinafter referred to as "Amber") was liable to National Starch & Chemical Corporation, Plaintiff-Appelle (hereinafter referred to as "National Starch"), for damages sustained to a shipment of tapioca flour which was carried aboard the S.S. HERMIONE.

These issues presented for review are as follows:

1. Was the Court below correct in holding that National Starch was entitled to maintain this action against Amber for damages sustained to a shipment of tapioca flour? The court held

that although the bills of lading were not formally endorsed or assigned to National Starch, that they were entitled, as the equitable or beneficial owner, to maintain the action against Amber for the loss sustained *(120 - 121a).

2. Was the Court below correct in holding that the action commenced in the Eastern District of New York (97a - 101a) was separate and distinct from the present action and did not act as a bar to National Starch's claim for cargo damage against the carrier? The Court held that Amber's defense of splitting a cause of action must fail for two reasons:

a). The action in the Eastern District, where National Starch was not a party, did not involve the same issues or claim for damages which are the subject matter of the present action (123a).

b). National Starch made a motion to consolidate the two actions (2a), which was denied (2a) as a result of the sworn statements of Amber in their answering affidavit opposing the motion. The affidavit stated in part:

> "that suit (the Eastern District action) does not involve in any way cargo damage . . . . The issue

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* Numerical references followed by the letter a refer to pages in the Appellant's Appendix.

in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same Judge." (123a - 124a)

3. Was the Court below correct in holding that Amber had failed to sustain their burden under the Carriage of Goods by Sea Act of 1936, 46 U.S.C. §1300 et seq., i.e. Amber failed to show that the loss to the goods was caused either by a peril of the sea or insufficiency of packaging? The Court held that Amber had failed to demonstrate that any condition encountered by the vessel was a "peril of the sea" (125a) and further that Amber failed to show by competent proof that the manner of packing was the cause of the damage (126a).

STATEMENT OF THE CASE

On March 24, 1972, National Starch and Tapioca Associates, Inc. entered into a contract of sale for 1300 metric tons of tapioca flour (Pl. Ex. 2 - 91a) which provided in part:

"No arrival-no sale; replacement by mutual agreement.

* * *

Except as otherwise provided the usual ex dock terms are to apply."

The terms and provisions of the original contract of sale (91a) were later modified by the parties on August 23, 1972, (Pl. Ex. 7 - 93a) and effectively changed the legal consequences involved, in the event the cargo was lost due to a marine or war risk peril. The amended contract (93a) stated in part:

"In the event of loss due to marine or war risk perils, resulting in non-delivery, Tapioca Associates, Inc. will be paid versus shipping documents." (emphasis supplied)

The testimony of both Mr. William Miller (26a - 27a) of Tapioca Associates Inc. and Mr. Nicholas Cremedas (43a - 44a) of National Starch clearly shows that the parties to the original contract of sale (91a) modified same (93a), to place the risk of loss due to marine or war risk perils directly upon National Starch, and further required National Starch to pay for the consignment versus shipping documents (44a).

Pursuant to the terms of the original (91a) and modified contract (93a) of sale, Tapioca Associates Inc. entered a contract with Amber on September 6, 1972, to transport a shipment of 1338 tons of tapioca flour from Thailand to the United States aboard the S.S. HERMIONE (107a). The vessel arrived in Philadelphia on November 14, 1972, (108a) and Mr. William Miller of Tapioca Associates Inc went aboard the vessel to inspect the shipments of tapioca flour (32a) and noted that the condition of the shipments was generally in very poor condition (32a), with pallets jostled and partly adrift (32a). Thereafter, because of a labor dispute with the longshoremen at the port of Philadelphia the vessel shifted to the port of Baltimore on November 17, 1972, to complete discharge (108a - 111a).

Before the arrival of the vessel at Philadelphia on November 14, 1972 (108a), Tapioca Associates Inc. sent an invoice to National Starch for the value of the subject shipment (Pl. Ex 1- 90a), together with three other invoices for other consignments of tapioca flour which were carried aboard the

S.S. HERMIONE (31a). In relation to these invoices, there is no question that National Starch paid the required amount to Tapioca Associates Inc. (30a - 31a), and furthermore, there is no question that Tapioca Associates Inc. never made a refund due to the condition of the cargo at time of delivery (32a).

After the cargo was discharged from the vessel, at Philadelphia and Baltimore, Tapioca Associates Inc. arranged for customs clearance and delivery to National Starch of the various lots of cargo (29a - 30a) which they had purchased (31a). Furthermore, Tapioca instructed the freight forwarders to surrender the bills of lading to the steamship company (29a) in return for delivery orders issued in the name of National Starch (30a), which has been introduced into evidence at the trial of this action (Pl. Ex. 5 - 92a).

There is no dispute between the parties regarding the type or extent of damages (120a) and there remains the issue regarding National Starch's right to maintain this action. The testimony of Mr. Miller of Tapioca Associates Inc. clearly and unequivocally shows that his company never filed a claim for the cargo damage to the subject shipment (42a) and that his company would not suffer any financial loss if the cargo were lost (42a). Since Tapioca Associates Inc. would not suffer any loss if the shipment never arrived (42a) and further since National Starch was required to pay, pursuant to the sales contract, against documents even if the goods were lost due to a marine peril (43a), the Court below held in part (120a - 121a):

> "While it is true that the bills of lading were not formally endorsed or assigned to plaintiff,

> it is clear that at all times, even before the issuance of the bills of lading, plaintiff, as the purchaser of the yet to be delivered shipment, was the beneficial owner thereof. This is underscored by the August 23 letter agreement between the plaintiff, as purchaser, and Tapioca Association, as seller of the shipment. The terms of that agreement provided that plaintiff was to be obligated for the full purchase price regardless of the condition of the goods upon delivery, plaintiff was to bear the risk of any damage to the goods during transit, and plaintiff, not the seller (as usually is the case in an ex dock sale), was to insure against that risk. Under this arrangement, even if plaintiff was not the formal holder of legal title, it was at least the equitable or beneficial owner and is entitled to maintain the action against the carrier for the loss sustained."

Also (122a):

> "In the instant case, as explained above, the plaintiff made its bargain for the goods as they were when shipped, obligated itself to pay its seller the agreed upon price regardless of any damage suffered in transit, and assumed the risk of any loss due to damage in transit."

Another issue raised in the Court below is the legal effect of the action commeced in the Eastern District of New York (97a - 101a), wherein Tapioca Associates Inc. sued Amber for additional freight payments (99a) necessitated by the failure of Amber to deliver various consignments, carried aboard the S.S. HERMIONE, to the port of Philadelphia, (99a). In that action Tapioca Associates never claimed to be the owner of the goods (97a - 101a) and never claimed for shortage or damage to the goods carried aboard the aforementioned vessel (42a).

In the present action National Starch bases their right to recovery on the fact that they were the owner of the goods at the time of loss (7a) and are specifically seeking recovery for

shortage and damage to the goods which were in the care and custody of Amber (7a).

Amber in the Court below introduced into evidence the record of the action in the Eastern District (58a - 63a) and attempted to assert that Tapioca Associates were the owners of the goods at the time in question (61a) and that the action in the Eastern District precluded National Starch from recovery in the present action (61a). In relation to these allegations it is clear that Judge Bartels (106a - 118a) never asked to determine the ownership of the cargo, and further that Tapioca Associates Inc. never claimed to be the owners of the goods at the time of the loss (97a - 101a).

Furthermore, National Starch was not a party to the action in the Eastern District (106a) and should not be bound by the actions or proceedings therein, especially in view of the sworn statements of Amber in opposition to National Starch's motion to transfer and consolidate the two actions (17a - 18a). Amber stated (18a):

> "It is also alleged in that complaint that part of the cargo was discharged in Philadelphia and part in Baltimore and sought to recover from the carrier the extra cost of transporting the cargo from Baltimore to its destination over what would have been the cost from Philadelpnia.
>
> That suit does not involve in any way the damage to cargo. None is claimed. That case has been set for trial by Judge Bartels for Tuesday, August 6th at 10 A.M. The defendant will not be prepared at that time to try the issue of damage to this cargo. The issues in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same Judge.

It is therefore submitted that the motion to transfer should be denied."

The Court below held in part (123a - 124a):

"Insofar as the defendant claims that plaintiff was not the owner of the cargo, its only legitimate concern is that in the event it is found liable, it is not called upon to pay damages twice for the same loss. There is no danger of double recovery in this case since Tapioca Associates upon this trial expressly disavowed any claim for loss in connection with the cargo. Moreover, Tapioca Associates, in a suit in the Eastern District of New York referred to hereafter, did not include any such claim. Under all the circumstances, the defendant cannot defeat plaintiff's claim by contending that only Tapioca may assert such a claim.

The defendant makes a further contention that plaintiff is barred from recovery in this action by reason of judgment entered in an action brought in the Eastern District Court by Tapioca Associates against the defendant herein, the carrier, to which action plaintiff here was not a party, to recover for increased trucking charges made necessary when the cargo was unloaded at a port other than that originally designated. This plea must fail in the light of defendant's own position in opposing consolidation of this action with the Eastern District action. The defendant expressly acknowledged that '[t]hat suit [the Eastern District action] does not involve in any way cargo damage . . . . The issue in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same Judge."

The last two issues to be resolved by this Court concern possible defenses, to the loss and/or damage occasioned by the subject shipments, under the Carriage of Goods by Sea Act of 1936, 46 U.S.C. §1300 et seq.. Amber in its answer to National Starch's complaint asserted that the damages to the subject shipment were caused by storms and perils of the sea and/or improper and inadequate pack-

aging (11a - 12a). In relation to the former, i.e. peril of the sea, the Master of the S.S. HERMIONE stated that the weather experienced on the voyage was to be expected (54a) and that it was not unusual to encounter storms with winds from 8 to 10 on the Beaufort Scale (54a). The Court below held (125a):

> "Defendant has not demonstrated that any condition encountered by the vessel to a 'peril of the sea'."

In relation to the defense of improper or inadequate packaging, both Mr. Miller of Tapioca Associates (28a - 29a) and Mr. Edward Horger (88a - 89a), a marine surveyor called as an expert by Amber, testified that this type of packing had been used or seen before on other shipments and that they had outturned from other vessels without any damage. The Court below held in part (125a - 126a):

> "The defense of inadequate packaging does not affect plaintiff's claim of non-delivery; it only relates to the claim for damage to delivered goods. Plaintiff's and defendant's witnesses differed as to whether the palletized tapioca was covered on the top and all four sides with fiberboard, whether there were vertical posts at the four corners of the pallet, and whether the bags of tapioca were glued to each other and to the floor of the pallet. Photographs admitted into evidence support the defendant's position that two sides of most pallets were substantially exposed, although all edges were protected by fiberboard. But even accepting this fact, and assuming that the pallets did not have posts at each corner and that the bags were not glued in any way, it does not follow that the packaging was inadequate. The defendant's witness, a marine surveyor, testified that shippers of tapioca at the time alternated between a four sided package and a two-sided package, and that he has seen other shipments packed the same way that outturned without damage. There was a lack of competent proof that the manner of packing was the cause of the damage."

In conclusion, the Court below held that the plaintiff, National Starch, was entitled to recover the total stipulated amount of damages (126a).

SUMMARY OF ARGUMENT

The Court below was correct in holding that National Starch, as either the owner or beneficial owner of the goods in question, is entitled to maintain this action against Amber for the losses and/or damages sustained to their goods, and is not precluded from recovery by the holding in any other action, to which they were not a party, which involves separate and distinct claims for damages against Amber.

The Court below was correct in holding that the defenses of Amber, i.e. that the damages sustained to the shipment were caused by a 'peril of the sea' and/or insufficiency of packaging, must fail, since Amber has failed to show proof that the loss and/or damage was occasioned by either a peril of the sea and/or insufficiency of packaging.

In conclusion, the opinion of the Court below should be affirmed and the appeal dismissed, with costs.

POINT I

NATIONAL STARCH IS ENTITLED TO MAINTAIN THIS ACTION AGAINST AMBER.

On March 24, 1972, National Starch and Tapioca Associates Inc. entered into a contract of sale for 1300 metric tons of tapioca flour (Pl. Ex. 2 - 91a) which provided in part:

> "Except as otherwise provided the usual ex dock terms are to apply."

The parties, pursuant to their rights to alter or modify the terms of the original contract of sale, Carnival Co. vs. Metro-Goldwyn Mayer Inc. 258 N.Y.S. 2d 110 (1st Dept. 1965), mutually agreed to modify the original contract of sale (91a) by a letter dated August 23, 1972, (Pl. Ex. 7 - 93a). The modified contract of sale (93a) provided that National Starch was required to pay Tapioca Associates Inc. against documents, rather than simply for what was delivered ex dock (93a). It (93a) provided in part:

> "In the event of loss due to marine or war risk perils, resulting in non-delivery, Tapioca Associates, Inc. will be paid versus shipping documents." (emphasis supplied)

Furthermore, the testimony of both Mr. William Miller (26a - 27a) of Tapioca Associates Inc. and Mr. Nicholas Cremedas (43a - 44a) of National Starch clearly shows that the parties to the original contract of sale (91a) clearly intended to modify same to provide that in the event of loss due to a marine peril National Starch was still required to pay the full contract price against documents.

On November 13, 1972, and before the arrival of the S.S. HERMIONE in Philadelphia (108a), Tapioca Associates invoiced National Starch for four shipments carried aboard the vessel, which National Starch had purchased pursuant to the amended contract of sale (31a). Subsequently, by a draft dated November 29, 1972, (Pl. Ex. 8 - 94a) National Starch paid $175,261.36 to Tapioca Associates for the four shipments, including the shipment in question (31a).

While the term "ex dock", as provided in the original contract of sale (91a), usually means that title and risk of loss do not pass to the buyer until the goods are placed at his disposal at an

agreed port and time, Bes J. Chartering and Shipping Terms (8th Ed. 1972) pp. 274 - 275, the parties by their agreement (93a) may alter the effect of this term and provide that title and risk of loss pass at a time prior to the delivery at a designated pier and/or wharf, U.C.C. §1-102 (3). U.C.C. §1-102 (3) states in part:

> "(3) The effect of provisions of this Act may be varied by agreement, ... the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

See also U.S.C. §1-1-2(3), Official Comment.

Therefore, since the parties effectively altered the "ex dock" term of the original contract (91a) by providing that National Starch would pay for the goods against documents (93a), U.C.C. §1-102(3) supra, and furthermore, since Tapioca Associates Inc. ran no risk if the goods were lost at sea (42a), National Starch had at least the risk of loss during ocean transit (121a), if not also the title, to the goods in question, before the ocean carrier breached its contract of carriage by failing to deliver the shipment in the same good order and condition as received at the port of loading (121a). The Court below stated (121a):

> "The terms of that agreement provided that plaintiff was to be obligated for the full purchase price regardless of the condition of the goods upon delivery, plaintiff was to bear the risk of any damage to the goods during transit, and plaintiff, not the seller (as usually is the case in an ex dock sale), was to insure against that risk. Under this arrangement, even if plaintiff was not the formal holder of legal title, it was at least the equitable or beneficial owner and is entitled to maintain the action against the carrier for the loss sustained."

While National Starch was not a nominal party to the bills of lading (120a), it was atleast the equitable or beneficial owner under the bills of lading (121a), who were permitted to take the

cargo from the pier by virtue of delivery orders (92a) executed to National Starch on behalf of the bill of lading holder, Tapioca Associates Inc., its vendor (30a), and is entitled to maintain this action, as equitable or beneficial owner of the goods, against a negligent ocean carrier for losses sustained, Elia Salzman Tobacco Co. vs. S.S. Mormacwind 371 F (2d) 537 (2nd Cir. 1967), M. W. Zack Metal Co. vs. The S.S. Birmingham City 291 F(2d) 451 (2nd Cir. 1961), Compagnie de Navigation etc. vs. Mondial United Corp. 316 F(2d) 163 (5th Cir. 1963), David Crystal Inc. vs. Cunard Steam-Ship Company, 223 F. Supp. 273 (S.D.N.Y. 1963).

In Elia Salzman Tobacco Co. vs. S.S.Mormacwind, supra the Court at p. 540 held:

> "that section 4(5) was not intended to alter the long-established rule that an owner or consignee may recover for damage to cargo, and that, being protected against double recovery, the carrier has no concern with any equities, between the owner or consignee and others." (emphasis supplied)

In M. W. Zack Metal Co. vs. The S.S. Birmingham City, supra, where the plaintiff was not a nominal party to the bill of lading, the Court held at p. 453:

> "At no time did any of the parties in the somewhat disconnected chain of title challenge the fact that libelant was the beneficial owner of the steel. Indeed, when its right to maintain this action was questioned, libelant obtained from Framen Steel Supply Company, Inc., and from Schwabach & Co., assignments of any claim they might have against respondents for damage to the steel in question. In view of these facts we think that, irrespective of niceties of 'title', libelant was clearly the beneficial owner of the steel shipped on respondent's vessel, and as such was entitled in its own right to maintain this action for damages. F.R.17(a).

We are able to reach this result without reliance on the fact that it received assignments from two of its suppliers." (emphasis supplied)

Further in Compagnie de Navigation etc. vs. Mondial United Corp., supra, where the plaintiff was not a nominal party to the bills of lading but was required to pay for the goods, the Court held at p. 172:

"There is no substance to the contention that the libelant lacked standing to sue and recover. True, Mondial United Corp. was neither the shipper nor the consignee. The shippers were two foreign concerns in Italy. The consignee, as to each shipment, was Glass Arts, Inc. a corporation having substantial relation to Florida and whose executive officer appeared as a witness and from whom decisive testimony was obtained on the liability feature. Libelant was not, however, a complete stranger to these goods. It acted as a commission agent for the manufacturers. Under the evidence, libelant was the party to whom both the shipper and consignee of the goods looked for payment for the goods, the delivery of the bills of lading, the adjustment of claims for loss or damage, and the like. The record was undisputed that as to three of the four shipments, Mondial has paid Glass Arts, Inc. in full for the amounts allowed by the decree. As to the fourth shipment-discussed above in connection with the cross appeal-only approximately $7,000 had been paid pending receipt of further information, insurance settlements, etc.

While this is another instance in which this case has been needlessly complicated by the failure to offer formal proof on matters which, as a practical matter, are really not open to any serious question, we think Mondial established a sufficient relationship to entitle it to recover. M. W. Zack Metal Co. v. S.S. Birmingham City, 2 Cir., 1961, 291 F.2d 451, 1961 A.M.C. 1545. By virtue of that relationship to the goods and the other parties interested

in them, it sustained an actual loss. It stands substantially as an equitable assignee or subrogee. It is not, then the case of a mere interloper who, sustaining no damage, nevertheless recovers a substantial amount." (emphasis supplied)

See also David Crystal Inc. vs. The Cunard Steam-Ship Co. supra, where the Court found, that although David Crystal Inc. was not a nominal party to the bills of lading, that it was entitled, as owner of the goods to maintain the action against a negligent ocean carrier.

Therefore, since National Starch was required to both, bear the risk of loss during ocean transit (121a), and pay the full purchase price regardless of the condition of the goods upon delivery (121a), and furthermore, since National Starch did in fact pay the full purchase price for the whole shipment (30a - 31a), there is no question that National Starch is entitled to maintain this action against a negligent ocean carrier, as either the equitable or beneficial owner of the goods, and is entitled to recover for the loss sustained, Elia Salzman Tobacco Co. vs. S.S. Mormacwind supra, M. W. Zack Metal Co. vs. The S.S. Birmingham City, supra, Compagnie de Navigation etc. vs. Mondial United Corp., supra, David Crystal Inc. vs. Cunard Steam-Ship Co. supra.

Furthermore, it is an established practice in admiralty that the issue of real party in interest is more liberally construed than in actions at law where the plaintiff must establish that he suffered the loss. United States vs. United State Steel Products Co. 27 F(2d) 547 (S.D.N.Y. 1928), Aunt Jemima Mills Co. vs. Lloyd Royal Belge 34 F(2d) 120 (2nd Cir. 1929).

POINT II

THE SUIT BY PLAINTIFF-APPELLEE'S VENDOR AGAINST AMBER IN THE EASTERN DISTRICT OF NEW YORK, RELATING TO THE SHIPMENTS ABOARD THE S.S. HERMIONE, DOES NOT TERMINATE NATIONAL STARCH'S RIGHT TO RECOVER FOR THE DAMAGES SUSTAINED.

An action was commenced in the Eastern District of New York (97a - 101a) by Tapioca Associates Inc. against Amber for additional freight expenses (99a) incurred as a result of the failure of Amber to deliver various consignments carried aboard the S.S. HERMIONE to the port of Philadelphia (99a). In that action Tapioca Associates Inc. never claimed to be the owner of the goods (97a - 101a) and never claimed for shortage or damage to the goods carried aboard the aforementioned vessel (42a).

In the present action National Starch bases their right to recovery on the fact that they were the owner of the goods at the time of loss (7a) and are specifically seeking recovery for shortage and damage to the goods which were in the care and custody of Amber (7a).

Amber in the Court below introduced into evidence the record of the action in the Eastern District (58a - 63a) and attempted to assert that Tapioca Associates were the owners of the goods at the time in question (61a) and that the action in the Eastern District precluded National Starch from recovery in the present action (61a). In relation to these allegations it is clear that Judge Bartels (106a - 118a) was never asked to determine the ownership of the cargo, and further that Tapioca Associates Inc. never claimed to be the owners of the goods at the time of the loss (97a - 101a). As a matter of fact the testimony of Mr. Miller of Tapioca Associates Inc., in the Court below, clearly shows that his principals were to

be paid in any event against documents (121a), even if the goods were lost and never delivered by the ocean carrier (42a).

Upon learning of the suit in the Eastern District, National Starch filed and argued a motion to consolidate the two actions (2a), which was denied (2a) as a result of the sworn statements of Amber in their affidavit in opposition to National Starch's motion (17a - 18a). Said affidavit states in part (18a):

> "It is also alleged in that complaint that part of the cargo was discharged in Philadelphia and part in Baltimore and sought to recover from the carrier the extra cost of transporting the cargo from Baltimore to its destination over what would have been the cost from Philadelphia.
>
> That suit does not involve in any way the damage to cargo. None is claimed. That case has been set for trial by Judge Bartels for Tuesday, August 6th at 10 A.M. The defendant will not be prepared at that time to try the issue of damage to this cargo. The issues in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same judge.
>
> It is therefore submitted that the motion to transfer should be denied."

In relation to Amber's defense of splitting a cause of action (58a - 63a) the law clearly states:

> ...where a party brings an action for a part only of an entire indivisible demand, and recovers judgment he cannot subsequently maintain an action for another part of the same demand." Baird vs. United States, 96 U.S. 430, 432 (1877).

In the present action National Starch has commenced an action for cargo damage only (7a) and has included all the possible causes of action against Amber for which it is entitled to recover. On the other hand, the action commenced by Tapioca Associates Inc.,

in the Eastern District of New York (97a - 101a), was specifically limited to additional freight payments incurred as a result of the failure of Amber to discharge the cargo at the port of Philadelphia (99a). Furthermore, National Starch was not a party to the action commenced in the Eastern District of New York (97a) and should not be bound by any determination therein, Moores Federal Practice, Vol. 1B §0.411 (1).

Therefore, since the parties in both suits are not the same i.e. Southern District action plaintiff is National Starch and Eastern District plaintiff is Tapioca Associates Inc., and furthermore since Amber has admitted that the suit which was commenced in the Eastern District is separate and distinct from the present controversy and does not in any way involve damage to cargo (18a), it is National Starch's contention that it has fully complied with the Federal Rules of Civil Procedure regarding splitting of causes of action, Baird vs. United States, supra, Moores Federal Practice Vol. 1B §0.410 (2), see also Buder vs. Fiske, 174 F(2d) 260, 268 (8th Cir. 1949) where the Court in relation to splitting causes of action stated:

> "... that the rule does not apply where the two causes of action are separate, even though they might have been joined in a single action."

Further as stated in Household Goods Carrier's Bureau vs. Terrell 452 F(2d) 153, 157 (5th Cir. 1971):

> "Moreover, it is well established that in a proper case one wrongful act may be the subject of two or more separate and distinct issues of action."

In view of the foregoing, the Court below held (123a - 124a).

> "The defendant makes a further contention that plaintiff is barred from recovery in this action by reason of judgment entered in an action brought in the Eastern District Court by Tapioca Associates against the defendant herein, the carrier, to which action plaintiff here was not a party, to recover for increased trucking charges made necessary when the cargo was unloaded at a part other than that originally designated. This plea must fail in the light of defendant's own position in opposing consolidation of this action with the Eastern District action. The defendant expressly acknowledged that '[t]hat suit [the Eastern District action] does not involve in any way cargo damage. . . . The issue in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same Judge'."

POINT III

NATIONAL STARCH HAS ESTABLISHED ITS PRIMA FACIE CASE AGAINST AMBER FOR THE LOSS SUSTAINED.

Receipt of cargo in good order and failure to deliver as well as delivery in a damaged condition creates a prima facie case. Compagnie de Navigation etc. vs. Mondial United Corp. 316 F(2d) 163 (5th Cir. 1963); Demsey & Associates vs. Sea Star 461 F (2d) 1009 (2nd Cir. 1972); Caterpillar Overseas S.A. vs. S.S. Expeditor 318 F(2d) 720 (2nd Cir. 1963) Levatino Company Inc. vs. S.S. Norefjell 231 F. Supp. 307 (S.D.N.Y. 1964); Nichimen Company vs. M.V. Farland 333 F.Supp. 691 (S.D.N.Y. 1971).

The Court below found that the goods were received by Amber in good condition, as evidenced by the clean bills of lading (124a) and the parties agreed that the cargo was delivered by Amber short or otherwise damaged (120a). This therefore creates a prima facie case against Amber for the losses sustained, Compagnie de Navigation etc. vs. Mondial United Corp. supra.

POINT IV

AMBER HAS FAILED TO ESTABLISH THE CAUSE OF THE LOSS IS ATTRIBUTABLE TO PERIL OF THE SEA OR IMPROPER PACKING.

Amber has the burden of proof and must show that the losses sustained by the subject shipment were the result of an excepted peril enumerated in the Carriage of Goods by Sea Act of 1936, 46 U.S.C §1300 et seq., Schnell vs. The Vallescura 293 U.S. 296 (1934). At page 304 and 305 the Court stated that a carrier:

> ". . . is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. See Bank of Kentucky vs. Adama Express Co., 93 U.S. 174, 184; Chicago & Eastern Illinois R. Co. v. Collins Produce Co., 249 U.S. 186, 192, 193; Railroad Co. vs. Lockwood, 17 Wall. 357, 379, 380."

and page 305:

> ". . . If he delivers a cargo damaged by causes unknown or unexplained, which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a prima facie case of liability. It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage. Knch v. Lamberts, supra, 357; The Maggie Hammon, supra, 459; The Folmina, 212 U.S. 354, 361; Chespeake & Ohio Ry. Co. vs. Thompson Mfg. Co., 270 U.S. 416, 422, 423."

Furthermore, Amber may indulge in surmise as to which of a number of things may have been responsible for the loss of the cargo. However, the plaintiff's prima facie case cannot thereby be overcome. Judge Murphy in Karabagui v. The Schickshinny, 123 F. Supp. 99, 102 (S.D.N.Y. 1954), affirmed 227 F.(2d) 348 (2 Cir. 1955), said:

> ". . .Prima Facie evidence is, of course, like all evidence, susceptible to rebuttal; but unrebutted, it remains sufficient as a matter of law to establish the ultimate proposition it purports to prove (citing Kelly vs. Jackson, 6 Pet. 622, 632). It goes without saying that such evidence can only be overcome by contrary proof, and not by mere surmise and speculation."

(a) HEAVY WEATHER (Peril of the Sea):

The legal meaning of a peril of the sea was succinctly and emphatically declared by our Court of Appeals in R. T. Jones Lumber Company v. Roen Steamship Company, 270 F(2d) 456, 458 (2 Cir. 1959); affirming 158 F. Supp. 304 (W.D.N.Y. 1957):

> "Notwithstanding the respondent's contrary contentions, the numerous definitions of 'peril of the sea' place its meaning beyond dispute. We noted in the Duche case that a multiplication of definitions serves no useful purpose, and we accept now as we did then the following definition as accurately stating the legal meaning of 'perils of the sea'.
>
> 'Perils of the seas are understood to mean those perils which are peculiar to the sea and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.' The Giulia, 2 Cir., 218 F. 244, 746."

Thus, to constitute a peril of the sea, the weather must be so catastrophic as to triumph over those safeguards by which a staunch and adequately equipped vessel with its cargo properly stowed and secured, could withstand. The Rosalia, 264 F. 285 (2 Cir. 1920); Virgin Islands Corp. v. The Merwin Lighterage Company, 251 F. 2d 872 (3 Cir. 1958).

Among other decisions, holding that even though severe weather was encountered it did not constitute a peril of the sea because the weather was not catastrophic, irresistible or overwhelming were: The West Kebar, 147 F. 2d 363 (2 Cir. 1945); Norris Grain Co. v. Great Lakes Transit Corporation, 70 F. 2d 32 (7 Cir. 1934), cert. denied 293 U.S. 565 (1934); The American Counsellor, 158 F. Supp. 264 (S.D.N.Y. 1957); The Emilia, 13 F. Supp. (S.D.N.Y. 1935); The John B. Waterman 86 F. Supp. 487 (S.D.N.Y. 1949).

If the weather experienced during the voyage could be anticipated, the storm definitely does not constitute a peril of the sea. The Vizcaya, 63 F. Supp. 898 (E.D. Pa. 1945); The Norte, 69 F. Supp. 881 (E.D. Pa. 1947); The American Counsellor, supra.

As to the so-called peril of the sea defense, the Master of the S.S. HERMIONE testified that it is normal to expect storms on the voyage from Bangkok to New York during October - November (54a), and that a force 10 on the Beaufort scale for eight hours during such storms is similarly usual (54a), and that he recalled similar wind forces on earlier voyages (54a). Furthermore, other than

a ripped canvas life boat cover, there was no structural damage to the vessel (57a). As a matter of fact the only cargo noted by the Master to have shifted in stow was tobacco (55a).

Since the weather on the voyage in question was not so catastrophic as to triumph over a properly equipped vessel with cargo properly stowed, The Rosalia supra, and since the Master admitted that the weather encountered was reasonably foreseeable (54a), and further since none of the subject shipment shifted during the alleged heavy weather (55a), Amber has failed to exempt itself from liability under the excepted cause of "peril of the sea", Schnell vs. Vallescura, supra.

(b) INSUFFICIENCY OR IMPROPER PACKING:

As previously pointed out, Amber has the burden of proof to show that the cause of the loss occasioned by the shipment resulted from improper or insufficiency of packing, Schnell vs. Vallescura, supra.

Although there is conflicting testimony as to the exact method of packing (125a-126a), the testimony of both Mr. Miller of Tapioca Associates Inc. (28a - 29a) and Mr. Edward Horger (88a - 89a), a marine surveyor called as an expert by Amber, clearly shows that the type of packing used for the subject shipment had been the same type used or seen before on other shipments and that they had outturned from other vessels without any damages. Therefore, as stated in the Court below (126a):

"There was a lack of competent proof that the manner of packing was the cause of the damage."

In conclusion, Amber has failed to sustain their burden of proof under the Carriage of Goods by Sea Act of 1936, 46 U.S.C. §1300 et seq., i.e. Amber failed to affirmatively show that the damages sustained resulted from either a "peril of the sea" or "improper packing", Schnell vs. Vallescura, supra, and National Starch is entitled to full recovery since their prima facie case remains unrebutted, Karabagui vs. The Shickshinny, supra.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED AND THE APPEAL DISMISSED, WITH COSTS.

Respectfully submitted,

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ROBERT E. DALEY
Of Counsel

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 8TH day of OCTOBER 1975

Arthur M Boal
.....
Attorneys for APPELLANT